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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GARY. W. DIXON, Warden, Central Prison, and LACY H. THORNBURG, Attorney General of the State of North Carolina,

Petitioners,

v.

ROBERT HENRY MCDOWELL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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This brief is submitted by respondent McDowell in opposition to the petition for writ of certiorari filed by petitioners Dixon and Thornburg on behalf of the State of North Carolina. The judgment which is the subject of the petition is the unanimous opinion of the Fourth Circuit reversing the District Court and directing that the writ of habeas corpus be granted. Chief Judge Winter authored the opinion, holding that due process was violated when the prosecutor failed to disclose evidence, inter alia, that Patsy Mason, the only eyewitness to the crime, initially and on at least two subsequent occasions described the assailant as a white man. Robert McDowell is, as the panel noted, "unmistakably black." McDowell v. Dixon, 858 F.2d 945, 949 (4th Cir. 1988) (Slip Op. at 9).[1]

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[1]From this point on in the brief, Mr. McDowell will refer only to the printed version of the Fourth Circuit opinion which is attached as an appendix to the certiorari petition. It is designated herein as "Slip Op."

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether petitioners' disagreement with the Fourth Circuit's analysis of the materiality of evidence undisclosed by the prosecutor -- an analysis undertaken in accord with all applicable constitutional principles and in keeping with the deference owed to the fact-finding of the State Courts and the District Court -- presents a question worthy of the Court's certiorari jurisdiction?

COUNTER-STATEMENT OF THE CASE

In substantial part, Mr. McDowell does not disagree with petitioners' statements of the case and facts. To the extent he disputes the statement of facts, his dispute is plainly noted in the argument that follows.

REASONS FOR DENYING CERTIORARI

In the absence of a decisional conflict or an important question involving the application of legal principles, the Court does not generally grant certiorari. Rule 17.1, Rules of the Supreme Court. Petitioners do not, and cannot, present any question here concerning decisional conflict or important questions of law. Petitioners do not claim that the panel decided this case using erroneous principles of law. Indeed, it is beyond argument that the three judges in this case correctly recognized that the due process violation must be evaluated under the principles of United States v. Bagley, 473 U.S. 667 (1985) and United States v. Agurs, 427 U.S. 97 (1976).

The gravamen of the question presented by petitioners is instead a claim that the Fourth Circuit so mis-analyzed the settled facts of this case that the Court should treat this matter as one of great public importance. As the petitioners framed it,

> [O]ne would expect that the panel carefully would have reviewed the evidence as summarized by the District Court,

> particularly since this is such an important state criminal matter. However, a comparison of the decisions reveals a surprising and disturbing lack of attention by the panel to the true facts, which inattentiveness cannot be allowed to remain unchallenged. Therefore, as a matter of fairness and in the interests of justice, this case warrants review by writ of certiorari.

(Petition at p. 15).

Even if petitioners' question were accurately raised -- and the Fourth Circuit had truly mis-analyzed the facts -- this question would not ordinarily be certworthy. "We do not grant certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). See also, Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J.). However, as we demonstrate herein, petitioners' question is not accurately raised. The Fourth Circuit was in no respect inattentive to the true facts, as those facts were found in the State Courts and the District Court.

Petitioners' real complaint is their disagreement with and non-acceptance of the Fourth Circuit's analysis of the materiality of the facts which were concealed by the prosecutor. Petitioners, at bottom, cannot articulate any misapplication of law or mistaken consideration of fact: they would simply apply the law to the facts differently. Surely such a complaint cannot support review by certiorari. If it did, every losing party would have an equally legitimate claim on the Court's time, and the court's unique role in our system of law would be lost. To show that petitioners' complaint is no more than this, we now turn briefly to an examination of the Fourth Circuit's decision.

The panel decision in this case was a reasoned, well considered application of settled principles of law to the facts of the case. It was based upon the undisputed facts of the case, and neither ignored nor slighted the opinions of the other courts which have considered the case. Four of the six judges who have ruled on the merits of Mr. McDowell's claims have now

found due process to have been violated: one State Superior Court Judge, Robert Collier, and the unanimous panel of the Fourth Circuit.[2]

Notwithstanding petitioners' hyperbole, the panel opinion did correctly address the pertinent facts of this case. Robert McDowell is "unmistakably black." Patsy Mason was the only eyewitness to the crime. There was no confession in this case, no fingerprints, no fiber evidence, no physical evidence at all that placed Robert McDowell in the Mason house on the night of this crime. Patsy Mason did tell a police officer within hours of the attack that the assailant was white. (App. 107). She did tell family members that the assailant was white. (App. 138). Two days after the attack she did tell SBI Agent Scheppf that the assailant could have been white. (App. 119). After she began to describe the assailant as black, she did tell Scheppf that the man had a medium afro. (App. 120). At trial Patsy did testify that the assailant was Robert McDowell, a black man with flat hair, and even though she was asked about her prior descriptions, neither she nor the prosecutors ever told the jury or defense counsel that she had given differing descriptions of her assailant. (App. 15, 22, 37-38).

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[2]Judge Collier's opinion, only one year after the affirmance of Mr. McDowell's judgment on direct appeal, was vacated on the State's appeal to the North Carolina Supreme Court due to his failure to apply the appropriate legal standard. State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984). The Supreme Court did not fault Judge Collier's factfindings but directed that he reconsider the undisclosed exculpatory evidence under the following materiality standard: "Would the evidence, had it been disclosed to the jury which convicted the defendant, and in light of all other evidence which that jury heard, likely have created a reasonable doubt which did not otherwise exist as to defendant's guilt?" 310 S.E.2d at 309. After a different Superior Court judge on remand concluded that the undisclosed evidence was not material under this standard, the North Carolina Supreme Court declined further review. (App. 250). ("App." refers to the appendix filed in the Fourth Circuit pursuant to the Federal Rules of Appellate Procedure.) The only other judge to decide the merits of Mr. McDowell's claim, prior to the decision by the Fourth Circuit panel, was the District Court judge.

These are the undisputed and material facts of this case. These facts were fully discussed in the panel's opinion, are consistent with the findings of fact in both the District Court and the State Court, and fully support the panel's decision to reverse Mr. McDowell's conviction. Petitioners do not suggest -- nor could they -- that the panel erred by ignoring specific findings of fact by the District Court relating to the credibility of a witness. See e.g., Anderson v. Bessemer City, 470 U.S. 564 (1985); Amadeo v. Zant, __U.S.__, 100 L.Ed.2d 249 (1988).

Petitioners' quarrel with the panel is, at bottom, no more than a disagreement with the panel's finding of materiality, a question which petitioners acknowledge is a mixed question of fact and law to be decided de novo on appeal. (Petition at p. 15). This can be seen with respect to each of petitioner's allegations that the panel ignored the "true" facts.

The panel neither ignored nor mischaracterized Frances Jenkins' testimony. The panel acknowledged that "there is not insubstantial evidence that Robert McDowell murdered Carol Hinson and assaulted Patsy Mason." (Slip Op. at 12). This "not insubstantial" evidence included the testimony of Frances Jenkins, which the panel described as "circumstantial evidence" that Mr. McDowell had "behaved suspiciously" on the night in question. This certainly is a correct characterization of Frances Jenkins' testimony. It did not place Mr. McDowell in the Mason house, however, and thus is circumstantial evidence.[3] It

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[3]Petitioners flatly misrepresent the evidence in one respect to try to make it more than circumstantial. Referring to the machete and the nunchukhs recovered from Mr. McDowell's residence, petitioners say that "Patsy identified this machete ... [and] these same nunchukhs" as those that were in her assailant's possession. (Petition at p. 16). While Patsy testified that her assailant had a machete and nunchukhs (Tr.T. 155, 161-62), she could only say that the machete and nunchukhs recovered from Mr. McDowell's house were similar to those carried by her assailant. (Tr.T. 195-96). She could not -- and did not -- say "this machete" or "these same nunchukhs" were the very ones carried by her assailant.

does indeed show that he behaved suspiciously that night. Mr. McDowell has never argued otherwise.[4]

The panel ruled, however, that Patsy's prior inconsistent identifications were, even in light of this evidence, material. Given the critical nature of Patsy's testimony and the lack of other evidence placing Mr. McDowell in the Mason household, the panel was undoubtedly correct. Petitioners may disagree with this conclusion, but a disagreement of this sort has never been a reason for granting certiorari.

Petitioners also complain that the panel refused to completely discount Patsy's contradictory identifications of her assailant because of her injuries at the hospital. However, the findings of fact made by the State Court and the District Court, that Patsy's injuries could have been found by the jury to have caused the inconsistent descriptions of her assailant's race, were fully accepted by the panel and were not in any way ignored or mischaracterized in contravention of the presumption of correctness articulated in 28 U.S.C. §2254(d).[5] The panel simply disagreed with the District Court's assessment of the materiality of these facts:

> [T]hat evidence is not so overwhelming that we can say that the jury inevitably would have been persuaded that her in-court identification was entirely truthful and conclusive, and that her memory and credibility were beyond reproach.

(Slip Op. at 10).[6]

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[4]While raising suspicion about Mr. McDowell, Frances Jenkins' testimony about his behavior upon his return home that night could also be seen as consistent with Mr. McDowell's own explanation to the police: he had been involved in a fight with two white youths that night, and he feared that they might have tried to follow him home. (App. 113-14).

[5]Petitioners invoke this presumption (Petition at p. 17) as if the panel failed to apply it, but do not thereafter argue that it did. Plainly, the panel faithfully adhered to the 2254(d) presumption. The materiality of these facts -- not their existence -- is what the panel disagreed with the lower courts about.

[6]Mr. McDowell did not have to show that the undisclosed evidence probably would have led to an acquittal. The Court specifically rejected such an approach when it held that the

Petitioners' other attacks on the panel decision are similarly based on the misconception that suppressed evidence is not material if a juror could have discounted it. Even if a juror could have implicated Mr. McDowell, the panel was correct, and petitioners do not argue otherwise, that a juror could find impeaching the fact that Patsy made no mention of Stone's visit to her that night, that the man and his bicycle differed from Mr. McDowell in a number of significant respects, and that Stone saw someone who could not be identified positively as Mr. McDowell enter the Mason house through the front door (when Patsy testified that the assailant came through the side door). Similarly, whether the second white intruder entered the Mason household on Friday the 14th, as testified to by Sheila Jackson (App. 77), or a day earlier is simply not germane to the panel's decision.

It is germane, however, that Patsy Mason testified at trial that a black man with flat hair, Robert McDowell, attacked her and Carol Hinson. It is germane that the prosecutors had in their files evidence -- which they knew about but did not disclose -- that Patsy Mason on three occasions had identified or alluded to the assailant as a white man, as well as evidence that a white intruder had been seen in the house on two occasions shortly before the murder and that a witness outside the house had told the police facts inconsistent with Patsy Mason's testimony.

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materiality standard for newly discovered evidence is inapplicable to a situation of prosecutorial suppression of exculpatory evidence. United States v. Agurs, 427 U.S. at 111. Thus, the issue is not whether a juror could have discounted Patsy's inconsistent identifications on account of her injuries, but whether a juror could as well have given weight to Patsy's inconsistent identifications even in light of her injuries, and could therefore have entertained a reasonable doubt that did not otherwise exist. Id. at 112. See also, Bagley v. Lumpkin, 798 F.2d 1297, 1301 (9th Cir. 1986) (after remand); Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985); Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984).

CONCLUSION

Petitioners have had their day in court. They have fully presented their argument to the panel of the Fourth Circuit, and they have lost. Petitioners have presented no different arguments before this Court. These arguments failed to persuade the panel, and they are less persuasive here, where the Court's jurisdiction must be invoked by something more than disagreement with a court of appeals' materiality analysis, which has been conducted in full harmony with all applicable principles of law.

WHEREFORE, Mr. McDowell respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted, this 31st day of December, 1988.

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